LLOYD FERNANDO

v.

V. INDRARAJAH

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL HAMID OMAR J
[CIVIL SUIT NO. 495 OF 1971]
13 AUGUST 1982

LAND LAW: *Trespass - Encroachment - Whether defendant was encouraged to build - Justification for defendant's expenditure - Encroachment before issue of official survey plan - Whether any implied licence - Defendant to ascertain exact extent or boundary of his land.*

PROFESSIONS: *Architect - Duty of architect - Whether architect responsible for the encroachment.*

DAMAGES: *No actual loss suffered - Whether plaintiff entitled to recover damages in trespass.*

The plaintiff was at all material times the owner of Lot 15107 (Lot 102). He alleged that the defendant, the owner and occupier of adjoining Lot 15108 (Lot 101), built a fence, a drain, driveway and a wall which encroached upon his land occupying an area of approximately 588 sq. ft. The plaintiff's claim was that the defendant be ordered to pull down and remove the said structures, and to pay damages for trespass.

The main issue for determination as between the defendant and the plaintiff was whether there was an encroachment as alleged.

The defendant's case against the 3rd party (architect) was that if there was encroachment, the 3rd party was to be blamed for reasons that the 3rd party (architect) (a) was asked and therefore responsible to ascertain the boundary of the lot and (b) was under a duty to ensure that the house was built on Lot 101. In the event the defendant is held liable to the plaintiff, he contended that he should however be entitled as against the 3rd party the relief sought.

Held:

[1] The Court was satisfied that there was an encroachment by defendant of the plaintiff's lot of a total area of 588 sq. ft. The plaintiff had not encouraged the defendant to build on his (plaintiff's) land to justify, if any, an expectation by the defendant that he would be allowed to keep that encroached portion. There was no evidence to show that there was implied licence by the plaintiff to enable the defendant to retain that portion of the land.

[2] That fact that the defendant had built the house before the issue of official survey plan cannot in the Court's view be regarded as a licence to build upon another's land. Instead the onus should be upon the defendant to exercise very great care to ascertain the exact extent or boundary of his land before proceeding with any construction upon his land. On the evidence before the Court, the defendant has not satisfied that he has done that.

[3] It is the Court's finding that it was not part of the 3rd party's (architect's) duty to ascertain the boundary. The contractor and the defendant had taken upon themselves the task of ascertaining the demarcation of the lot. As between the defendant and the 3rd party the Court was unable to find any liability on the part of the 3rd party (architect) and dismissed defendant's claim with costs.

[4] Regardless of the fact that the plaintiff had suffered no actual loss, the plaintiff in trespass is entitled to recover damages. As for damages being loss of use by the plaintiff of the encroached portion, the Court assessed as loss of rent for the area of 588 sq. ft., a sum of RM60 per month (10¢ per sq. ft.) with effect from the date of completion of the defendant's house to the date of judgment (approximately 12 years 8 months), amounting to RM9,120.

[5] As for injured feeling suffered by the plaintiff, the anxiety and the conduct and motives of the defendant, the Court awarded a sum of RM6,000 as compensation.

[Plaintiff's claim allowed.]

Cases referred to:
Siew Soon Wah & Ors. v. Yong Tong Hong [1973] 1 MLJ 133
Inwards v. Baker [1956] 2 QB 29
E.R. Ives Investment Ltd. v. High [1967] 2 QB 379
Eng Mee Yong & Ors. v. V. Letchumanan [1979] 2 MLJ 212
T. Damodaran v. Choe Kuan Him [1979] 2 MLJ 267
Re Lee Kian Soo, An architect [1953] 19 MLJ 195
Florida Hotels Pty. Limited v. Mayo & Anor. [1965] 113 CLR
Leslie R. Fairn & Associates v. Colchester Development Ltd. [1976] 60 Dominion LR (3d) 681
Ooi York Choo v. Lim Song Foundry [1963] 29 MLJ 87
Janaki v. Cheok Chuan Seng [1973] 2 MLJ 96
Chaplin v. Hicks [1911] 2 KB 786

Legislation referred to:
National Land Code 1965, ss. 83 to 92

Other sources referred to:
Clerk & Lindsell on Torts, 14th Edn., para. 1318, 1329
Building and Engineering Contracts, Hudson's, I.N. Duncan Wallace, 10th Edn., p. 124
Halbury's Laws of England, 3rd Edn., Vol. 3, p. 525, para. 1042, p. 528, para. 1051, p. 531, para. 1057, 4th Edn. para. 1339, Vol. 12, para. 1189
The Architect in Practice, Willis and George, 5th Edn., p. 135
The Architect's Guide to Running a Job, Ronald Green, 3rd Edn., (1972)
Clerk and Lindsell, para. 1352, 1317

For the plaintiff - Wong Chong Wah; M/s. Skrine & Co.
For the defendant - V.K. Palasuntharam (S.M.Ratnam with him); M/s. S.M. Ratnam
For the 3rd Parties - S. Kulasegaran; M/s. Ranjit, Thomas & Kula

JUDGMENT

Abdul Hamid Omar J:

The plaintiff at all material times the owner of Lot 15107 (Lot 102) alleges that the defendant, the owner and occupier of adjoining Lot 15108 (Lot 101), built a fence, a drain, driveway and a wall which encroached upon his land occupying an area approximately 588 sq. ft. as shown on the plan annexed to the statement of claim coloured pink. The plaintiff also alleges that the defendant failed to get out of the land and is therefore asking that the defendant be ordered to pull down and remove the said fence, drain, driveway and wall and to pay damages for trespass.

The facts are not substantially in dispute. Both the plaintiff and the defendant purchased Lots 102 and 101 respectively from Realty Development Corporation (RDC). Each entered into a sale agreement to purchase, the plaintiff on 10 November 1967 and the defendant on 30 September 1966.

The plaintiff, his architect (PW2) and land surveyor (PW5) visited the site and on PW2's instruction PW5 prepared a demarcation and contour plan (AB28) based on site plan made available to him. Vacant possession was delivered to the plaintiff on 23 January 1968 (AB21), qualified title issued on 6 June 1970 (AB33) and final title on 4 July 1978 (P1 and P2).

The defendant obtained vacant possession on 23 January 1968 and issued with both qualified title and final title on 6 June 1970 and 4 July 1978 respectively. The plaintiff started his building sometime in 1970 and first became aware of possible encroachment in early 1970 upon discovery by the contractor of an error in the actual area. A fresh survey was commissioned. The demarcation survey (PB3) shows the encroachment.

It is the defendant's case that he entered into agreement with RDC on 30 September 1966 to purchase Lot 101. In 1968 he saw the architect Lai Lok Kun (3rd party) as he wanted to build a house. He asked Lai to ascertain the boundaries of his lot, design a suitable building, obtain the necessary approval, select a suitable contractor, proceed with building and ensure that the house was built on Lot 101. He entered into a building contract with the contractor on 26 January 1969. The building commenced on 1 February 1969 and was completed on 20 October 1969. The defendant maintained that the contractor built the fence, drain and wall on his land. The defendant alleged that while the house was being built he saw RDC men carrying on with some surveying and there was no protest from them. The 3rd party did not suggest that he should take a surveyor to survey Lot 101 and he placed reliance entirely on the 3rd party.

According to the defendant the first intimation of any encroachment he received was from the plaintiff's solicitors. After that his solicitors wrote to the 3rd party (see DB1).

The main issue for determination as between the defendant and the plaintiff is whether there was an encroachment as alleged. This is essentially a question of fact. The finding will be made on the materials before the Court. In so doing the Court will rely substantially upon the officially surveyed plan produced in evidence in respect of which there emerges no real dispute. Evidence reveals that before the plaintiff and the defendant purchased the lots they were supplied with site plans showing only the approximate area (plaintiff's Lot 102 - 10870 sq. ft.; the defendant's Lot 101 - 10,210 sq. ft.). The final area was to be determined only after completion of sub-division and upon issue of separate title (see Clause 4(a) and 5 of the agreement - AB 10 or AB 35). The final area of the plaintiff's Lot (Lot 102) was 9671 sq.ft. and the defendant's (Lot 101) 9693 sq.ft.

On instruction of the plaintiff and at the request of the plaintiff's architect Chen Voon Fee, Mr. Narayanan, Juru Ukor of Vallentine Dunne & Co., surveyed Lot 102. A site plan was forwarded to Narayanan. It showed the bend in the boundary of Lot 102 fronting the road. This is confirmed by Narayan. It showed the bend in the boundary of Lot 102 fronting the road. This is confirmed by AB28, the land survey plan prepared by Narayanan. Qualified title was issued on 19 July 1970. The plan on the title further confirms the bend. It tallies with the survey department plan AB123 - the official survey plan prepared by Khoo Soo Guan. AB123 was completed on 10 October 1969 and certified on 21 March 1970. This plan was approved by the appropriate authority on 26 August 1971.

It is in evidence that a request was made by the plaintiff's architect to Khoo Soo Guan to resurvey the plaintiff's lot and a resurvey was carried out in response to that request. When this was done, Khoo Soo Guan wrote to the plaintiff's architect (see PB2) attaching a plan (PB3) to show an encroachment of the plaintiff's lot by 11 feet.

On the materials produced I am satisfied that there was an encroachment by the defendant of the plaintiff's lot to the extent shown in PB3. There is no basis whatsoever, I think, for the defendant to maintain that he believed the shaded portion belonged to him. It is contrary to the clear proof provided by the documentary evidence. Indeed there is nothing whatever to support his contention. It is my finding that there is established an encroachment of a total area of 588 sq. ft. by the defendant of the plaintiff's land.

The next question to consider is whether there is merit in the defendant's contention that there is an equity or equitable interest or equitable estoppel in favour of the defendant to keep the area encroached and built upon by his contractor as part of the construction of a house for the defendant since October 1969 and has since continued in the defendant's enjoyment.

Mr. Palasuntharam Counsel for the defendant argued that in view of the circumstances of the development, building and survey of the various lots in Stage 2 there were bound to be some difference in the area built upon by the various purchasers before 2 March 1970, i.e., before the issue of official survey plan certified on 2 March 1970 and the areas shown on the official survey plan (AB123). He also argued that for this reason equitable estoppel must be deemed to have arisen among the persons who entered into agreements with RDC for the purchase of the lots. The effect of such estoppel should be to allow those who built upon an area of land the subsequent survey (AB123) shows to be included in the adjoining land to keep such built area. The adjoining landowner should only be granted compensation.

The case of *Siew Soon Wah & Ors. v. Yong Tong Hong* [1973] 1 MLJ 133 with reference to the statement of principle at p. 137 by Dankwerts LJ in *Inwards v. Baker* has been cited to support the defendant's contention. My conclusion after examining the case is that there is evidently a fallacy in the argument. *Inwards v. Baker* [1956] 2 QB 29 was a case where a son had built on his father's land and had lived on it thereafter in the expectation and belief that he would be allowed to remain there for his lifetime or for so long as he wished. The basis upon which equity was founded in that case is stated by Lord Denning MR at p. 37 as follows:

> ... in this case, even though there is no binding contract to grant any particular interest to the licensee, nevertheless the Court can look at the circumstances and see whether there is an equity arising out of the expenditure of money. All that is necessary is that the licensee should, at the request or with the encouragement of the landlord have spent the money in the expectation of being allowed to stay there. If so, the Court will not allow that expectation to be defeated where it would be inequitable so to do. In this case it is quite plain that the father allowed an expectation to be created in the son's mind that the bungalow was to be his home. It was to be his home for his life or, at all events, his home as long as he wished it to remain his home. It seems to me, in the light of that equity, that the father could not in 1932 have turned to his son and said: 'You are to go. It is my land and my house.' Nor could he at any time thereafter so long as the son wanted it as his home.

The facts of the present case are clearly distinguishable from those in that case and I do not see how in this case equity or equitable estoppel could be said to arise. The plaintiff had not encouraged the defendant to build on his (plaintiff's) land to justify, if any, an expectation by the defendant that he would be allowed to keep that encroached portion. The fact that the defendant had built the house before the issue of official survey plan cannot, in my view, be regarded as a licence to build upon another's land. Instead the onus should be upon him to exercise very great care to ascertain the exact extent or boundary of his land before proceeding with any construction upon his land. On the evidence before the Court he has not satisfied me that he has done that. As for the plaintiff he was clearly not guilty

of any delay in taking action to recover the encroached area. This was a positive indication that the plaintiff was not willing to allow the defendant to keep the encroached area. There was also no evidence to show that implied licence by the plaintiff to enable the defendant to retain that portion of the land.

Counsel for the defendant is also relying on the unreported case of *Lee Eng Peng (f) v. Kandiah Kanapathippai* K.L.High Court C.S. No. 307 of 1967, the case of an innocent mistake by a third party (original owner) who built the shophouse on Lot 177 on the mistaken belief that the building would stand entirely on Lot 177. And when he sold the said Lot 177 in 1953, he had sold the lot including the building under the same mistaken belief.

Here too the facts are entirely different. I do not think the case supports the defendant's contention that as there was an innocent mistake he should therefore benefit from his mistake. In *Lee Eng Peng's* case the defendant was a subsequent purchaser for valuable consideration and without notice and suffice to say that it is not so in the present case.

I also see no substance to support the defendant's argument that there could be equity arising out of acquiescence as in the case of *E.R. Ives Investment Ltd. v. High* [1967] 2 QB 379. In that case there was a reasonable expectation on the part of one Mr. High that his access over the yard, would not be disturbed. He built a garage with access only over the yard at his expense acquiesced by the other party.

Finally, it is the defendant's contention that while his contractor was constructing the house no letter of protest was sent by or on behalf of the RDC to him alleging any encroachment although persons conducting a survey for the RDC saw the construction by his contractor. Thus the plaintiff as the successor in title of RDC is estopped from thereafter complaining of encroachment and an equity in favour of the defendant should arise.

My view is that there cannot be any equity arising in favour of the defendant. There is no mistake of any kind on the part of the RDC or the plaintiff. If there was any fault that has emerged on the materials before the Court, it is clearly that of the defendant's and/or his contractor. Since the defendant had chosen to build on his land before the final survey was completed, he therefore had taken upon himself the responsibility to take all steps necessary to avoid encroachment on somebody else's land. What should also be borne in mind is that the defendant and his contractor were advised by the architect to have the lot surveyed and for this purpose to see the manager of the RDC. Mr. Koay Kim Sui PW2 testified that the defendant and his contractor did see him and he in fact showed them the demarcation boundary pegs. He also advised them to engage the company's surveyor Messrs. Khoo Soo Guan. He did not however know whether they took his advice or not. The inference I can gather from the evidence is that he did not.

Poh Sin Bin a qualified licensed surveyor who took over from Khoo Soo Guan testified that the record shows, referring to PB2 the letter from Khoo Soo Guan, that as far as the encroachment was concerned it was a case of wrong boundary mark being adopted. Under cross-examination by the defendant's Counsel he stated that it was a mistake made by contractors when locating boundary stones.

In the light of the circumstances of this case, I am of the view that this is not the sort of mistake that gives rise to any equity in favour of the party responsible for such mistake. The encroachment was occasioned by the lack of care on the part of the defendant or his contractor brought about by a failure to take steps to properly ascertain the boundary marks or locate the same.

For the plaintiff it is submitted that when the defendant commenced construction of the building in 1969 he had no knowledge of the encroachment and for this reason had not made any representation. Nevertheless he did it as soon as it appeared clear that there was an encroachment after his lot was surveyed. It is also submitted that the defendant has not at all rebutted this fact indeed the defendant's architect has admitted that there was encroachment.

The plaintiff is also relying on the indefeasibility of title. He is contending that Lot 15107 (102) is held under final title (Grant No. 2863) and under the provisions of the National Land Code (see ss. 83 to 92). And under s. 340 of the Code the registered owner is vested with an indefeasible title subject only to sub-section(2) of s. 340 which provides for certain exceptions, i.e., where there is fraud, misrepresentation, forgery and so forth, none of which applies in the instant case. The cases of *Eng Mee Yong & Ors. v. V.Letchumanan* [1979] 2 MLJ 212 and *T.Damodaran v. Choe Kuan Him* [1979] 2 MLJ 267 are relied upon as affirming this principle that gives certainty of title under the Torrens system.

I am satisfied that there is substance in the plaintiff's submission and the Court must indeed have regard to the nature of the title acquired by the plaintiff under the National Land Code. His title may only be defeated under the circumstances provided by law.

Counsel for the plaintiff Mr.Wong Chong Wah urged the Court to consider the fact that the plaintiff was in possession of the land as far back as 1966/1967. Upon entry he was deemed to have been in possession from the date when his right of entry accrued, and in law trespass is actionable at the suit of the person in possession of the land. (see *Clerk & Lindsell on Torts* (14th Edn.) para. 1318, 1329).

In the light of the finding that this Court has arrived at, I do not think I need discuss the point at length.

What remains to be considered is the nature of the relief that this Court should order and the quantum of damages following the Court's finding that the plaintiff has a legal title over that encroached portion. I shall deal with this shortly.

I now turn to consider the defendant's case against the 3rd party. It is the defendant's contention that the 3rd party is to be blamed for the encroachment for reasons that the 3rd party (a) was asked and therefore responsible to ascertain the boundary of the lot; and (b) was under a duty to ensure that the house was built on Lot 101.

As for (a), the defendant testified that the 3rd party did not tell him to take a surveyor to survey Lot 101. I cannot accept that. There is abundance of evidence to satisfy me that in all probability the 3rd party did tell the defendant. Apart from the 3rd party's own testimony that it was not his job to ascertain the boundary he went further to say that following the normal practice he requested the defendant together with his contractor to see the developer to identify the location and the defendant was to engage a surveyor or get the developer to survey the lot.

As for the defendant's case against the 3rd party, it is pleaded that in the event he is liable to the plaintiff, he should however be entitled as against the 3rd party the relief sought. It is the defendant's contention that he engaged the 3rd party for valuable consideration to ascertain boundaries of Lot 101, to design a house with drains, surrounding fences and wall and to build within the boundaries so ascertained, prepare drawings and specifications therefor, obtain necessary approval, to advise defendant in the selection of contractor and to supervise due construction including location of house, drains and surrounding fences and walls within the boundaries of Lot 101.

It is also pleaded that the 3rd party ascertained or purported to ascertain the boundaries of lot 101 and designed a house to be built within the boundaries ascertained. He also supervised the construction including location of drains, fences and walls.

The defendant contended that if there was encroachment it was due negligence of 3rd party on account of a breach of duty in the performance of the works excepted of him.

The 3rd party Lai Lok Kun, an architect in private practice, is not disputing that in December 1967 he was commissioned by the defendant to be the architect to design and supervise the defendant's house on Lot 101 Jalan Bukit Pantai. A copy of site plan was handed to him by the defendant. Building was completed and certificate of fitness issued. From design to completion he met the defendant frequently during and outside office hours. He personally supervised the working. The setting out of the building was done by the contractor. He maintained that no agreement was signed between him and the defendant and in the absence of any such agreement the conditions as set out by PAM applied. He disputed that the defendant had requested him to ascertain the boundary. Architects, he said, are not professionally trained to conduct survey. The normal thing to do is to request the client to refer to the developer to identify the location of the plot of land and it is for him to get a surveyor or developer to survey the lot. In this instance he advised the defendant to refer to the developer and the defendant did that before the contractor set up the building. He also advised the contractor to accompany the defendant to meet the developer and was told by both the defendant and the contractor that they saw the developer. RDC representative Mr. Bill Koay confirmed that he went with the contractor and the defendant to the site to show them the boundary stones.

Counsel for the 3rd party Mr. Kulasegaran submitted that between 1967 and 1969 it was neither the custom nor the established practice for an architect to ascertain the boundaries of site unless expressly included in the contract between the architect and the client. The architect's duty to his client is to be governed by the contract.

Mr. Kulasegaran also dealt with the question of the normal scope of an architect and the PAM's conditions of engagement. He further submitted that the contracts of engagement are not normally in writing.

It is the 3rd party's submission that, in the light of the dictum of Brown J in *Re Lee Kian Soo, An Architect* [1953] 19 MLJ 195 at p. 197 that "... an architect's duty to his client is to perform the work which it has been mutually agreed that he should do it." It appears clear that his duty to his client is governed by his contract.

Reference is made to the general outline of the normal scope of an architect which is set out in *Hudson's Building and Engineering Contracts* by I.N.Duncan Wallace, 10th Edn. at p. 124, to show that this scope can be varied by consent and contract. The scope of duties however does not include ascertainment of boundaries.

Reliance is also placed on the PAM's condition of engagement (see pp. 124 to 129 of the agreed bundle of documents) which, it is submitted, governed the relationship between the defendant and third parties and that is not the duty of the architect to ascertain the boundaries.

My attention is drawn to *Halsbury's Laws of England*, 3rd Edn. Vol. 3 p. 525 para. 1042 as follows:

> Architects and engineers are not usually employed under a written contract when the employment is to design and superintend a building or works. ...

As for the duties of architects it is pointed out that they are to exercise a reasonable amount of care and diligence in carrying out the work undertaken and are not required to exercise an extra-ordinary degree of skill - see *Halsbury's Laws of England*, 3rd Edn. p. 528 para. 1051 which reads:

> As to the amount of skill required, the architect or engineer need not necessarily exercise an extraordinary degree of skill. It is not enough to make him responsible that others of greater experience of ability might have used a greater degree of skill or even that he might have used some greater degree. The question is whether there has been such a want of competent care and skill, leading to the bad result, as to amount to negligence.

On the question of test of want of skill reference is make to the *Halsbury's Laws of England*, 3rd Edn. Vol. 3 p. 531 para. 1057.

On the other hand, the defendant submitted that (a) if the architect fails to exercise reasonable precautions in the examination of the site on which the works are to be constructed, he will be liable to the employer for any loss occasioned by him thereby, and the employer is entitled to bring an action either the architect or builder.

Reference is made to para. 1339 of *Halsbury's Laws of England*, 4th Edn. Vol. 4, to show that the duty of superintendence is "to give such an amount of supervision as will enable him to give an honest certificate whether or not the work has been done in accordance with the contract."

In support the defendant cited the case of *Florida Hotels Pty. Limited v. Mayo & Anor.* [1965] 113 CLR, the headnote of which reads:

> Architects retained to give such periodical supervision and inspection as might be necessary to ensure the execution of certain works generally in accordance with plans and specifications made no arrangements that they should be notified of the completion of formwork or of the placement of reinforcement during the construction of a suspended swimming pool, nor did they give instructions that concrete should not be poured before inspection of the formwork and the reinforcement in position. Certain reinforcing mesh was improperly laid by employees of the building owner with the result that the reinforcing strength of the mesh was substantially reduced. Concrete was poured in the absence of the architects. Later, when the formwork was prematurely removed at the direction of the building owner a concrete slab formed where the defective reinforcement was laid collapsed, severely injuring an employee of the building owner. It appeared that because of the inherent weakness for want of proper reinforcement the slab would have collapsed whenever the formwork was removed.
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> Held, that the architects were in breach of their obligation to the building owner to supervise the work with due care and skill.
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> Held, further, that the possibility of liability of the building owner to its workmen flowing from the consequences of lack of supervision of the work by the architects must be taken to have been fairly within the contemplation of the parties, and accordingly the architects were liable to pay to the building owner the damages reasonably paid by it to its injured workmen.

It is to be observed that *Florida Hotels' case* dealt with the duty of supervision in respect of the execution of certain works in accordance with plans and specifications. And there was a failure to do that on the part of the architects. However it is important to note that in that case the architects were retained pursuant to an oral arrangement which incorporated a paragraph drawn from the literature of the Australian institute of architects to the effect that

> The Architect shall give such periodical supervision and inspection as may be necessary to ensure that the works are being executed in general accordance with the contract; constant supervision does not form part of the duties undertaken by him.

In my view that duty expressed and accepted in Australia and formulated in a document issued by the Royal Australian institute of architects, and more importantly, the fact that it was made known by the employers to the architects had influenced the decision in that case.

The crucial issues that arise in the instant case, as between the defendant and the 3rd party, may however be summarised as follows:

(a) the duties of the 3rd party to the defendant in respect of the works for which he was engaged;

(b) the terms of the engagement as between the defendant and the 3rd party;

(c) whether it was the architect's duty to perform the works alleged by the defendant the 3rd party had to do.

I do not think generally there is substantial difference in the general principles of law that govern the relationship of architects and their employers in Australia and in this country and so also the law in regard to the duty of a architect. An architect employed to supervise the construction of a building must bring a proper degree of skill to his task and exercise reasonable care in its performance. Apart from the law which relates to the general duty, architects in each country do formulate certain guidelines concerning the duties of architects. These are local practices. Architects are expected to conform with these guidelines that may differ from country to country.

Now in order to decide whether in the present case it was the duty of the 3rd party to perform the works alleged by the defendant to be that of the 3rd party's, I have to take into account not only the general duty expected of an architect under the general law but also the established practice applicable at the material time. In this regard it is important to consider what in fact was the nature of the undertakings by the 3rd party under an arrangement or contract between the defendant and the 3rd party.

One of the cases cited by Counsel for the defendants as to the duty of an architect is *Leslie R. Fairn & Associates v. Colchester Developments Ltd.* [1976] 60 *Dominion Law Reports* (3d) 681 at p. 685. In that case there is an implied term in the architect's contract imposing on the architect the duty to produce a design reasonably skillful and effective to achieve a purpose of the building's owner, and in so doing to have regard to the exigencies of the site. In the circumstances of that case the finding was that there was a breach of the term.

Speaking of the duty of an architect Mr. Palasuntharam quoted a passage from Willis and George, *The Architect in Practice,* 5th Edn. (1974) p. 135 which reads:

> The setting out of the works, however, is especially important, and should be carefully checked by the architect or his clerk of works.

I am also referred to a paragraph in Ronald Green, *The Architect's Guide to Running a Job,* 3rd Edn. (1972) whereby it is stated that

> Following the preliminary discussion, a letter of confirmation should be sent to your client setting out the agreed terms of appointment.

It is also stated that one of the things this letter should cover will be a check whether there is a survey available and whether, if not, arrange with the client the immediate appointment of a surveyor.

I have dealt quite at length with the law and practices concerning the duties of architects and what is really important at this point is to decide whether on the facts of this case it was the duty of the 3rd party to ascertain the boundary and if it was whether there was a breach of that duty.

The onus is on the party who alleges that the 3rd party owned this duty. It is for the defendant therefore to do so. I have earlier on made a finding of fact that on the balance of probabilities the 3rd party did request the defendant to get the land surveyed. Lai's testimony was substantiated by the evidence given by the representative of RDC. It would therefore appear that the 3rd party had not accepted any responsibility to ascertain the proper boundary of the defendant's plot of land. This responsibility was, on the evidence, assumed by the defendant and the contractor, both of whom accompanied the RDC representative to the site and were shown the boundary pegs. It is reasonable to assume that the RDC representative had properly identified the pegs as there appears to be no allegation whatever by the defendant that the RDC representative had given some wrong information. Basically it may be accepted that it was the 3rd party's duty generally to supervise the setting out of the building, the wall and drains. However, it would appear clear that such duty to supervise would apply so far as might be necessary for purpose of ensuring the execution of the works generally in accordance with plans and specifications. In that regard there cannot be any question of any breach of duty on the part of the 3rd party. The error was only in respect of the boundary adjoining the plaintiff's land and, as I have stated earlier, such error was occasioned by either the defendant or the contractor or both of them, in respect of which the 3rd party cannot be blamed.

On the facts it is the finding of this Court that the defendant and the contractor were themselves responsible for the ascertainment of the boundaries. If the defendant's contractor had set out the wall and drains on land he thought was the defendant's land on account of erroneous identification boundary marks by him and/or the defendant they only had themselves to blame. No liability can in my view be attached to the 3rd party.

For reason unknown to this Court the contractor was not called to testify for the defendant. Nevertheless I do not find any necessity to draw unfavourable inference against the defendant for his failure to do so as there is sufficient evidence for me to make a finding of fact that it was not part of the contract between the 3rd party and the defendant that the 3rd party be under a legal obligation to ascertain or survey the defendant's land.

It frequently happens that owners of a new plot of land, having acquired the lots in circumstances similar to the defendant's, become so anxious to build houses on them that they fail to realise the need to ascertain the boundaries carefully. Many would not wait for the proper survey to be carried before commencing a building in the result that his has invariably led to encroachment of the adjoining lot.

Now on closer examination of the facts I find that the defendant himself admitted that he did not sign any agreement with the 3rd party, and under cross-examination, that in the conditions of engagement there is no reference to the ascertaining of the boundaries. He however denied that Lai advised him to secure the surveyor. He also denied the visit by Koay to the site to show the boundary pegs. And he further denied that Koay advised him to get the survey done by Khoo Soo Guan.

As for the 3rd party, he is not denying that no agreement was signed between him and the defendant. He maintained that in the absence of such agreement the conditions set out by PAM applied. Lai stated that as architect he was not professionally trained to conduct a

survey. He also stated that the normal thing to do is to request the client to refer to the developer to identify the location of the plot of land. The idea was that he (defendant) should get a surveyor from the developer to survey the lot.

Counsel for the defendant cross-examined the 3rd party at length in an attempt to establish that the 3rd party did not request the defendant to see the RDC representative to identify the lot. In answer to a question by the defendant's Counsel on the area of defendant's land having regard to the stipulation in the agreement that adjustment would be made after final survey, the 3rd party said that this was the reason why he asked the defendant to approach the developer to verify the boundary before starting work.

In answer to a further question by the defendant's Counsel, the 3rd party stated and I quote:

> Q: Did you ask defendant to appoint a surveyor to survey or identify land.
>
> A: Under normal circumstances when I am aware that plot of land to put up a building if there is a final title to it I would advise client to appoint a surveyor to confirm the boundary position. In an instance where there was no final title and was not sure if final survey had been carried out - futile to request for survey because surveyor would have no basis to carry out such works. Therefore appropriate party to advise was the client and contractor to establish this boundary from the developer.

Koay Kim Sui who was sales and administration manager of RDC at the relevant time confirmed that both the defendant and the contractor Kok Kwai Wah called at his office to get him to show them the boundary stones and they did meet at the site where he showed to both the defendant and the contractor the boundary pegs (red pegs) on the defendant's land. He also advised both of them to engage the company's surveyor Khoo Soo Guan and Co.

Koay also testified that the defendant's architect requested him to show the defendant and the contractor the boundary marks.

The 3rd party called one Graham Moffatt, architect, partner in Nik, Sep James Ferrie to testify.

He has 30 years' experience and is chairman in the practice section of the institute of architects (PAM). He testified to the effect that it is no part of an architect's duty to ascertain boundary. It is the client's duty to provide and set out survey plan of the lot. An architect's duty is to draw plans based on plan provided by the client. Setting out is the builder's responsibility.

Mr. Moffatt also stated that in the absence of signed agreement between the architect and client one has to follow the normal practice, i.e. conditions in standard agreement between architect and client.

Suffice I think if I only highlight these salient points in the evidence. In my view they reinforced my finding that it was not part of the 3rd party's duty to ascertain the boundary. Clearly the contractor and the defendant had taken upon themselves the task of ascertaining the demarcation of the lot. If indeed, and I do find, they had done so it is not unreasonable to assume that the encroachment was the direct result of the error occasioned by the contractor or both he and the defendant.

In consideration it is my judgment that as between the defendant and the 3rd party I am unable to find any liability on the part of the 3rd party and I would dismiss the defendant's claim with costs.

As for the plaintiff's claim against the defendant, for reasons stated above, I am satisfied that the plaintiff's claim must succeed.

The questions that remain to be dealt with are firstly, the nature of the order this Court shall make in respect of the claim for the return of the land and secondly, damages.

The plaintiff has sought the following:

(i) A declaration that the defendant is not entitled to enter or cross the plaintiff's land known as Lot 15107, Mukim of Kuala Lumpur;

(ii) An injunction to restrain the defendant whether by himself or by his servants or agents or otherwise howsoever from entering or crossing the plaintiff's said land;

(iii) An order that the defendant do forthwith pull down and remove the said fence, drain and wall.

I am unable to see any reason why the relief sought not be granted. I would therefore order accordingly. However, it would appear necessary that time be given to the defendant to comply with (iii). Accordingly I make a further order to the effect that the defendant shall at his own cost and expense take all steps necessary, after removal of the fence, wall, driveway and drain, to clear level and tidy up the encroached area. The defendant is allowed 3 months from the date of this order. On or before the expiry date the Senior Assistant Registrar shall inspect the site together with the plaintiff and the defendant and their architects, and Counsel.

On the question of damages, it is the plaintiff's contention that he has lost the use of approximately 588 sq. ft. of his land since early 1970, i.e. when he first came to know of the encroachment. According to the plaintiff without the land encroached there is no flat land to form the garden. The plaintiff has two children 13 and 11 years old.

The plaintiff has complained of loss of privacy. The kitchen, he said, is in full view of people entering the defendant's land along the driveway and similarly the living room. He has also complained of the overhanging room of the defendant's house that affects the living room.

Further, the plaintiff expressed fear of the safety of his children on account of the cars entering in and out of the defendant's house via the driveway which is higher than his driveway.

Strictly the plaintiff has sustained no actual loss, however I see merit in the submission made by the plaintiff's Counsel that regardless the plaintiff in trespass is entitled to recover damages (see *Clerk & Lindsell,* para. 1352, 1317). See also *Ooi York Choo v. Lim Song Foundry* [1963] 29 MLJ 87, a case where the defendants used the plaintiff's land as a means of access to his accretion land owned under a licence without the plaintiff's permission. Exemplary damages was awarded to the plaintiff. (see also *Janaki v. Cheok Chuan Seng* [1973] 2 MLJ 96).

It is submitted by Counsel for the plaintiff that the Court in assessing damages should also take into account the fact that the plaintiff's feelings of dignity and pride are injured. Further, the Court should consider the defendant's motives, conduct and manner of committing the tort. (see *Halsbury's Laws of England,* 4th Edn. Vol. 12 para. 1189).

What emerges from the evidence is that the defendant had gainfully used that portion of the encroached land for over a period of twelve years and indeed a gain to the defendant was a loss to the plaintiff in that he was deprived of the use of that portion of land and as such, I think, he should be compensated for it.

It is revealed from the evidence that there was in fact an officially surveyed plan which showed clear encroachment of the plaintiff's land and the defendant's attention was drawn to it as early as 1970 but for reasons this Court cannot fathom he completely refused to accept the truth. His conduct in dealing with the dispute has, to put it mildly, been most unreasonable. If the defendant had been co-operative and had a genuine desire to solve the problem the matter could have been amicably settled some twelve years ago instead of allowing it to develop into a long drawn litigation creating in the process bad blood and ill feeling between him and the plaintiff.

It has been said that assessment of damages may sometimes be purely guesswork. (see *Chaplin v. Hicks* [1911] 2 KB 786 per Vaughan Williams LJ and at p. 795 per Fletcher Moulton LJ).

In the instant case it is anybody's guess what should be the proper sum to be awarded. Be that as it may, there is every justification that the Court should award damages. In my judgment the Court may award the damages under two heads, first, the loss of use of the encroached portion by the plaintiff; second, the injured feeling suffered by the plaintiff, the anxiety and under this head the conduct and motives of the defendant.

As for the first, I would assess as loss of rent for the area of this size a sum of RM60/-p.m. (10¢ per sq.ft.) with effect from the date of completion of the defendant's house to the date of judgment, a period of approximately 12 years 8 months - 152 months x 60 = RM9,120.

For injured feeling under the second head I consider it a reasonable compensation to award a sum of RM6,000.

Accordingly I order that damages in the sum of (a) RM9,120 and (b) RM6,000 and costs.

Also found at [1987] 2 CLJ 365